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March 3, 2017

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

RE: Notice of Ex Parte Meeting Regarding the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; CG Docket No. 02-278

Dear Ms. Dortch:

On March 1, 2017, Justin Wiseman, Director of Loan Administration Policy, Public Policy and Industry Relations at the Mortgage Bankers Association ("MBA"); Lauren Campisi of McGlinchey Stafford PLLC, counsel to the MBA; and Nicole Ehrbar, Vice President of Public Policy at Quicken Loans, Inc. ("Quicken Loans"), met with David Grossman, Chief of Staff to Commissioner Mignon Clyburn of the Federal Communications Commission (the "Commission") to discuss MBA's Application for Review it filed on December 15, 2016 (the "Application"). Enclosed please find the materials we provided during our meeting.

In its Application, the MBA respectfully requests that the Commission reverse an Order issued by the Consumer and Governmental Affairs Bureau (the "Bureau") on November 15, 2016, summarily denying MBA's Petition for Exemption from the "prior express consent" requirements under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, for certain non-telemarketing residential mortgage servicing calls[1] to cellular telephone numbers (the "Petition").

Mortgage servicing calls help borrowers. MBA seeks an exemption from the prior express consent requirements under the TCPA for residential mortgage servicing calls because these communications help consumers. The requirements to place these calls and their benefits to consumers are undisputed. Mortgage servicers must be able to speak to a delinquent borrower as early as possible after a payment default to explain available options. These calls directly benefit borrowers by allowing the mortgage servicer to work with the borrower to, among other things:

[1] Consistent with the Application and Petition, the references to "calls" within this letter are intended to include text messages.

- determine the reason for the delinquency and whether the reason is temporary or permanent in nature;
- determine whether the borrower has abandoned or vacated the property;
- determine the borrower's current perception of their financial circumstances and ability to repay the debt;
- set payment expectations and educate the borrower on the availability of alternatives to foreclosure;
- provide homeowner counseling information;
- discuss options upon the death of a borrower;
- discuss missing documentation needed to complete a loss mitigation application; and
- address misconceptions or misinformation about the effect of not making payments and other bad advice from debt relief scams.

The sort of timely, real-time interaction that occurs on a telephone call is particularly important. Length of delinquency is the second-most significant factor that drives the performance of the loan modifications necessary to keep a consumer in his or her home. In fact, one mortgage servicer's internal review noted a 50% increase in borrowers who became current on their loan when the servicer made up to five calls in the two weeks prior to the customer becoming 60 days delinquent, compared to those customers who were not called during the same time period.[2] Time is of the essence in loss mitigation efforts, and discouraging telephone contact creates obstacles to a borrower getting a modification or keeping his or her home.

The scope of the exemption should be consistent with other controlling law. MBA requests that for the purposes of this exemption the Commission adopt the long-settled regulatory definition of "mortgage servicing" as "all actions, including all communications, related to the receipt and application of payments pursuant to the terms of any loan or security agreement, execution of other rights and obligations owed under the loan or security agreement, the modification of any terms of the loan or security agreement, and any other loss mitigation

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[2] Comments of Quicken Loans Inc. to the Commission's Notice of Proposed Rulemaking on the TCPA's Budget Act Amendment, CG Docket No. 02-278 (filed June 6, 2016), at page 3.

options."[3] The Commission should confirm that the definition includes calls made to borrowers by HUD-approved housing counselors.[4]

Consumer advocacy groups support outbound calls to mortgage borrowers. As the National Consumer Law Center ("NCLC") highlighted in its Comment Letter to the Petition, the federal and state requirements for mortgage servicers to place outbound calls to borrowers require servicers "to have conversations with them, to ask questions, and to provide responsive information."[5] This is the exact type of communication the MBA seeks to facilitate through its Petition – live communications between borrowers and their mortgage servicers that are often required by federal regulators.[6] When promulgating its mortgage servicing rule, the Consumer Financial Protect Bureau ("CFPB") noted that "[c]onsumer advocacy groups were uniformly in favor of both an oral and written notice requirement."[7] The CFPB also cited a joint comment letter from the Center for Responsible Lending, Consumer Federation of America, and Center for American Progress supporting the CFPB's mortgage servicing rule's early intervention requirements, including outbound calls with delinquent borrowers, because research shows that

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[3] MBA proposes that this definition is consistent with the federal Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §2605(i)(3), and its implementing regulation, Regulation X, 12 C.F.R. § 1024.2(b). *See* 12 U.S.C. §2605(i)(3)(defining servicing as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 10, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan"); 12 C.F.R. § 1024.2(b) ("*Servicing* means receiving any scheduled periodic payments from a borrower pursuant to a federally related mortgage loan, including amounts for escrow accounts under section 10 of RESPA (12 U.S.C. 2609), and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, servicing includes making payments to the borrower.").

[4] Mortgage servicers are required to send written notice to borrowers within 45 days of delinquency that, among other things, identifies a website address and the HUD toll-free telephone number where the borrower can access the CFPB or HUD list of housing counselors and organizations. 12 C.F.R. § 1024.39(b)(2)(v). These counselors work with borrowers to better understand their options to avoid foreclosure and assist borrowers with the process of applying for loss mitigation options.

[5] Comment Letter of the National Consumer Law Center and Americans for Financial Reform, Center for Responsible Lending, Consumer Action Consumer Federation of America, Consumers Union, Financial Protection Law Center, Legal Services of New Jersey, Indiana Legal Services, Inc., Jacksonville Legal Aid, Inc., National Association of Consumer Advocates, National Association of Consumer Bankruptcy Attorneys, and U.S. PRIG (Collectively "NCLC"), at p. 7.

[6] For example, the government sponsored enterprises ("GSEs") provide best practices to communicate and build trust, including the following: "Build trust with the borrower within the first 10-15 seconds by establishing empathy and a desire to help identify and discuss with the borrower … the most appropriate options for delinquency resolution." "Hello my name is ____ and I am with ____. I see that you are behind in making your mortgage payments and I would like to talk more and see if there is anything we can do to help you get back on track."
Communicating with Borrowers: Collections and Loss Mitigation Reference Guide, Freddie Mac (July 2015)

[7] 78 Fed. Reg. 10696, at 10788.

borrowers have a lower re-default rate the earlier they are reached in delinquency.[8] The CFPB further explained that "delinquent borrowers may not make contact with servicers to discuss their options because they may be unaware that they have options or that their servicer is able to assist them. There is a risk to borrowers who do not make contact with servicers and remain delinquent; the longer a borrower remains delinquent, the more difficult it can be to avoid foreclosure."[9] These are calls that delinquent borrowers welcome and need to possibly save their homes.

The frequency of mortgage servicing calls is regulated by a patchwork of federal and state requirements. The federal agencies responsible for regulating residential mortgages learned through the experience of the financial crisis that telephonic communications with borrowers are critical to maintaining homeownership. These agencies require mortgage servicers to place outbound telephone calls to borrowers at various times throughout a loan. As described in the enclosed materials and within the Application and Petition, these requirements set ***minimum*** outbound calls requirements that can be as often as twice per week. That said, these communications are not unregulated. Rather, the timing, frequency and content of these communications are subject to multiple federal and state protections. In addition to this comprehensive regulatory framework, MBA proposed additional conditions on the exemption similar to the exemptions granted for package delivery notifications and healthcare and financial institution communications. The proposed exemption appropriately balances privacy interests with other federal and state regulations and the undisputed critical need to communicate with mortgage borrowers.

The Order was an inappropriate exercise of delegated authority. By regulation, the Commission has delegated authority to its staff "to act on matters which are minor or routine or settled in nature and those in which immediate action may be necessary." 47 C.F.R. § 0.5(c). As we discussed during our meeting, the Order was an inappropriate exercise of delegated authority because the Petition presented a novel legal issue of first impression deserving of full Commission consideration, not a minor or routine matter or one that is settled in nature for the Bureau to decide. For this reason alone, the Petition deserves full consideration by the Commission untainted by the Bureau's hasty Order.

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8 *Id.* (citing Goodman, Yang, Ashworth, and Landy, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications*, Submitted to the Pew Charitable Trusts Conference on Strategies for Revitali zing the Housing Market (May 30, 2012)).

9 *Id.* (citing, e.g., John C. Dugan, Comptroller, Office of the Comptroller of the Currency, *Remarks Before the NeighborWorks America Symposium on Promoting Foreclosure Solutions* (June 25, 2007), *http://www.occ.gov/news-issuances/speeches/2007/pub-speech-2007-61.pdf*; Laurie S. Goodman et al., Amherst Securities Group LP, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications* (June 19, 2012), at 5-6; Michael A. Stegman et al., *Preventative Servicing*, 18 Hous. Policy Debate 245 (2007); Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 11-12 (Freddie Mac, Working Paper No. 08-01, 2008)).

The Order is not supported by the TCPA or the record. This unprecedented exercise of delegated authority resulted in a legally and factually unsupported ruling. The Bureau denied the Petition on the ground that the MBA failed to demonstrate its members could make free-to-end-user calls. However, the free-to-end-user nature of the calls is a statutory prerequisite to any exemption granted under 47 U.S.C. § 227(2)(C). The petitioner does not bear any burden of proving its ability to make free-to-end-user calls. We further explained that even if this showing was a threshold requirement, it was satisfied. Mortgage servicers are just as capable of placing free-to-end-user calls as package delivery services, financial institutions and healthcare providers who received exemptions. The Bureau also found mortgage servicing calls are not sufficiently time-sensitive to warrant an exemption. This finding is unsupported by the record and conflicts with prior rulings by the Commission and wholly disregards comments submitted by the Federal Housing Finance Agency ("FHFA").

The Commission should grant the requested exemption. Nothing in the record of this Petition provides any support that should allow the TCPA, which was not enacted to regulate these communications, to have the unintended consequence of adversely impacting mortgage borrowers, loss mitigation communications, or homeownership preservation. It would be particularly unfortunate if the Bureau's cursory review of the Petition allowed the TCPA to frustrate the efforts of the agencies to which Congress has delegated discretion to set policy regarding the best methods of aiding mortgage borrowers in financial distress. MBA urges the Commission to remove these impediments, reverse the Order and grant the exemption, which would facilitate the ability of mortgage servicers to best fulfill their federal and state requirements and to communicate with borrowers, increasing the likelihood that they will avoid foreclosure and remain in their homes.

Pursuant to Section 1.1206(b) of the Commission's rules, the MBA is filing this notice electronically in the above-referenced docket. Please do not hesitate to contact me directly with any questions.

Sincerely,

McGlinchey Stafford

Lauren Campisi

Lauren E. Campisi

cc: David Grossman